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ALEXANDER L. STEVAS,
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-952

STATE OF MARYLAND, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

No. 82-953

TANDY CORP., APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RESPONSE OF THE UNITED STATES TO TELEPHONIC EQUIPMENT CORPORATION'S MOTION FOR LEAVE TO INTERVENE

The United States hereby opposes the motion of Telephonic Equipment Corporation ("TEC") for leave to intervene in these cases for the purpose of raising new issues relating to the judgment's effect on private lawsuits against AT&T.

1. TEC is a competitor of AT&T in the manufacture of telecommunications equipment. After the government first published the proposed modification of final judgment and competitive impact statement in this case (47 Fed. Reg. 7171 (1982)), __/ TEC filed comments in the district court. Subsequently, on May 25, 1982, the district court directed all

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__/ The proceedings in the district court are described in greater detail in the government's Motion to Affirm at 3-9.

interested persons to file briefs on several issues, including the scope of the "public interest" determination required under the Tunney Act, 15 U.S.C. 16(e). Order of May 25, 1982, at 6. In the same order, the court also required interested persons to "indicate whether they request participation as intervenors * * *" (id. at 5 n.14). Many persons filed briefs and requested leave to intervene, but TEC did neither.

On August 11, 1982, the district court issued a lengthy opinion on the proposed decree (No. 82-952 J.S. App. 1-172), in which it considered the objections of several persons to the decree's disclaimer of liability. The court ruled that the effect of the disclaimer under Section 5(a) of the Clayton Act (15 U.S.C. 16(a)) __/ was a matter to be decided in the course of future private antitrust litigation and concluded that the provision provided no ground for withholding approval of the decree (No. 82-952 J.S. App. 142-144). On August 24, 1982, the district court entered the consent decree. On August 26, 1982, the court granted numerous motions to intervene for the purposes of appeal or participating in ongoing decree proceedings (id. at 191-194). On September 1, 1982, TEC moved to intervene, but the district court denied the motion as untimely. The court also denied TEC's motion for certification of a direct appeal to this Court (see id. at 205 n.2, 207 n.9). On December 16, 1982, TEC moved to intervene in this Court.

2. The district court gave TEC ample opportunity to seek timely intervention, but it failed to do so. Accordingly, TEC bears a heavy burden of showing that it should be allowed the extraordinary step of intervention in this Court. That burden is

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__/ Section 5(a) of the Clayton Act provides that a final judgment entered in a government antitrust case "to the effect that a defendant has violated [these] laws shall be prima facie evidence against [a] defendant [in a private action] as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." Section 5(a) further provides that this prima facie effect is not available with respect to consent judgments entered before testimony is taken.

especially heavy here, since TEC seeks to inject into the Court's proceedings the issue of the decree's disclaimer of liability, which none of the numerous appellants has raised. __/ Responses to the timely-filed jurisdictional statements have already been filed, and allowing TEC to intervene and file its own jurisdictional statement would seriously and needlessly delay resolution of this case. In these circumstances, it is clear that TEC has not demonstrated that intervention is warranted.

This Court generally has allowed de novo intervention only in unusual circumstances where the applicants would qualify to intervene in the district court as of right or by statute under Fed. R. Civ. P. 24(a). See R. Stern & E. Gressman, Supreme Court Practice, 435-436 (5th ed. 1978); NLRB v. Acme Industrial Co., 384 U.S. 925 (1966) (union party to NLRB proceeding); Eastern-Central Motor Carrier Association v. United States, 321 U.S. 194, 198 n.5 (1944) (shipper organization party before ICC); United States v. St. Louis Terminal, 236 U.S. 194, 199 (1915) (shippers precluded by decree from use of rail service). Where the applicant for intervention lacked a sufficient interest to permit it to intervene as of right in the district court, however, this Court has denied intervention. See United States v. Paramount Pictures, Inc., 334 U.S. 131, 176-178 (1948); United States v. Patterson, 56 U.S. (15 How.) 10, 12-13 (1853).

TEC's interest in its own private suit would not entitle it to intervene as of right under Rule 24(a) in a government antitrust case. As this Court has recognized, government and private remedies for antitrust violations are separate and independent. United States v. Borden Co., 347 U.S. 514, 518-519 (1954). TEC does not allege that the judgment in this case will preclude any

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__/ In addition to the appeals in which TEC seeks to intervene, two other appeals have been taken from the district court's decision below. North American Telephone Ass'n v. United States, et al., No. 82-992, and Illinois v. United States, et al., No. 82-1001.

relief that it may seek against AT&T, and the possibility that the settlement of a government case may, as a practical matter, make relief sought by a private party somewhat more difficult to obtain than if the government had continued to litigate and won a judgment has never been held sufficient to support intervention as of right. See, e.g., Sam Fox Publishing Co. v. United States, 366 U.S. 688-690, 695 (1961); United States v. Associated Milk Producers, Inc., 534 F.2d 113, 116 n.3 (8th Cir.), cert. denied, 429 U.S. 940 (1976). Indeed, it is entirely speculative whether further litigation in the government suit would produce results helpful at all to TEC's private case. __/

3. Moreover, the primary issue that TEC seeks to raise (Motion at 7-9) is not yet ripe for decision. As the district court correctly noted (No. 82-952 J.S. App. 144), and TEC concedes (Motion at 9), the collateral estoppel effect in a later case of a judgment entered in earlier litigation is to be determined in the later case. Emich Motors Corp. v. General Motors Corp., 340 U.S. 558, 569 (1951). A disclaimer of liability, such as that included in the modification of final judgment here, is not necessarily conclusive. See Michigan v. Morton Salt Co., 259 F. Supp. 35, 62-64 (D. Minn. 1966), aff'd sub nom., Hardy Salt Co. v. Illinois, 377 F.2d 768 (8th Cir. 1967). If TEC brings a private suit and the judgment in the government case is not given collateral estoppel effect, TEC can appeal from that decision at that time. __/

__/ Should TEC file a private antitrust action, it is free to make use of all the trial record material in the government's 1974 suit against AT&T, where, as TEC notes (Motion at 2), AT&T's "efforts to prevent TEC from selling its products were relied upon by the government as part of its case-in-chief."

__/ TEC's contention (Motion 10-11) that the district court abused its discretion in entering the consent judgment as in the public interest because it did not include a provision that would enable private plaintiffs to invoke collateral estoppel is plainly without merit.

It is therefore respectfully submitted that the motion to intervene should be denied.

REX E. LEE
Solicitor General

DECEMBER 1982